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Supreme Court, U.S.
FILED
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

THEODORE ROBINSON, SR.,
Petitioner,
vs.
THE UNITED STATES OF AMERICA,
Respondent.

On Appeal From the United States Court of Appeals for the Eleventh Circuit

---

PETITION FOR WRIT OF CERTIORARI

MAURICE S. BELL
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Counsel of Record
For Petitioner

ORAL ARGUMENT REQUESTED

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30 pp

QUESTIONS PRESENTED FOR REVIEW

I.

The decision of the United States Court of Appeals, Eleventh Circuit, which held that utilization of a F.L.I.R. ["Forward Looking Infrared Radar"] Device is not sufficiently intrusive as to constitute an illegal, warrantless search and seizure; is patently erroneous and contravenes judicial authority established by this Honorable Court and other United States Courts of Appeal, as well as the precepts of the **Fourth** and **Fourteenth** Amendments of the **UNITED STATES CONSTITUTION.**

II.

The decision of the United States Court of Appeals, Eleventh Circuit, which held that the facts within the knowledge of the authorities at the time of the issuance of the search warrant for his residence were sufficient to constitute valid "probable cause" requisite to the issuance of the search warrant; is patently erroneous and contravenes judicial authority established by this Honorable Court and other United States Courts of Appeal, as well as the precepts of the **Fourth** and **Fourteenth** Amendments of the **UNITED STATES CONSTITUTION.**

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EXHIBITS

EXHIBIT "A"

Exhibit "A" contained in the Appendix to Petitioner's Petition For Writ Of Certiorari [Volume II] is the Order of the district court entered April 10, 1992; denying Petitioner's 3/20/92 Motion To Suppress as amended 3/26/92. References to this document shall be designated as "A".

EXHIBIT "B"

Exhibit "B" contained in the Appendix to Petitioner's Petition For Writ Of Certiorari [Volume II] is the Order of the district court entered July 1, 1992; denying Petitioner's 6/5/92 Motion To Suppress. References to this document shall be designated as "B".

EXHIBIT "C"

Exhibit "C" contained in the Appendix to Petitioner's Petition For Writ Of Certiorari [Volume II] is the Judgment and Commitment Order rendered by the district court on November 3, 1992. References to this document shall be designated as "C".

EXHIBIT "D"

Exhibit "D" contained in the Appendix to Petitioner's Petition For Writ Of Certiorari [Volume II] is the Order issued on August 31, 1995, by the United States Court of Appeals, Eleventh Circuit; affirming the judgment of the district court. References to this document shall be designated as "D".

EXHIBIT "E"

Exhibit "E" contained in the Appendix to Petitioner's Petition For Writ Of Certiorari [Volume II] is the 11/20/95 Order of the United States Court of Appeals, Eleventh Circuit; denying Petitioner's Application For Rehearing. References to this document shall be designated as "E".

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

THEODORE ROBINSON, SR.,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

On Appeal From the United States Court of Appeals for the Eleventh Circuit

---

PETITION FOR WRIT OF CERTIORARI

JURISDICTION

The Decision of the United States Court Of Appeals, Eleventh Circuit, affirming the judgment of the district court was rendered on August 31, 1995. The Decision of the United States Court Of Appeals, Eleventh Circuit, denying Petitioner's Application For Rehearing was rendered on November 20,

1995. Jurisdiction to review the judgment of the lower court by Writ of Certiorari is vested in this Honorable Court pursuant to Title 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL PROVISION

This case involves the fundamental proscription against warrantless search and seizure afforded to the citizenry of this country and set forth in the provisions of the **Fourth** and **Fourteenth** Amendments of the **UNITED STATES CONSTITUTION.**

The **Fourth** Amendment of the **UNITED STATES CONSTITUTION** states:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourteenth Amendment of the **UNITED STATES CONSTITUTION,** through its provisions, makes applicable to the States the pronouncements of the Fourth Amendment as follows:

> "Section 1. All persons born or naturalized in the United States, and

subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

STATEMENT OF THE CASE

On February 25, 1992, an Indictment issued by the Grand Jury was unsealed and a warrant was issued for the arrest of Your Petitioner, Theodore Robinson; charging him with Manufacturing and Possession With Intent To Distribute Marijuana, in violation of Title 21 **U.S.C.** §841(a)(1), Aiding and Abetting in the Manufacturing and Possession With Intent To Distribute Marijuana, in violation of Title 21 **U.S.C.** §841(a)(1) [Count I] and Using and Carrying Firearms During and In Relation To a Drug Trafficking Crime, in violation of Title 18 **U.S.C.** §924(c)(1). Pursuant thereto, Petitioner Robinson entered a plea of "Not Guilty" on March 10, 1992.

On March 20, 1992, Petitioner filed a Motion To Suppress and Request For Oral Argument on the merits of same and a Precautionary Motion To Suppress Evidence

Obtained By a Warrantless Search and Seizure and Request For Oral Argument on the merits of same with the district court. On March 26, 1992, Petitioner filed with that court an Amended Motion To Suppress and an Amended Precautionary Motion To Suppress Evidence Obtained By A Warrantless Search And Seizure. On March 27, 1992, Petitioner submitted a Memorandum of Law In Support of the Motion To Suppress to the district court.

On April 7, 1992, a Hearing was held on Petitioner's Motion To Suppress (D.S.6). On April 10, 1992, the trial court issued an Order in which Petitioner's Motion To Suppress was denied. (Exhibit "A").

On June 5, 1992, Petitioner, filed a Motion To Suppress with the district court. This motion was denied on July 1, 1992. (Exibit "B").

On August 7, 1992, Petitioner entered a conditional plea with the court; pursuant to Rule 11(a)(2), *Federal Rules of Criminal Procedure*, pleading "guilty" to Counts I and II of the indictment against him.

On October 26, 1992, Petitioner, being duly represented by counsel, appeared before the court for sentencing in the case at bar. In issuing judgment, the district court ordered, *inter alia*, that Petitioner be sentenced to 130 months in the custody of the United States Bureau of Prisons and to

supervised release for a period of four years upon release therefrom. (Exhibit "C").

On October 26, 1992, Petitioner filed a Notice of Appeal to the United States Court of Appeals for the Eleventh Circuit on the Order issued April 10, 1992, denying his Motion To Suppress. On November 10, 1992, Petitioner filed a Notice of Appeal to the Eleventh Circuit Court of Appeals regarding the Orders issued on April 10, 1992, and August 6, 1992, in which the district court denied all Motions To Suppress.

Petitioner is currently on release pending disposition of this appeal.

STATEMENT OF THE FACTS

Charles West was the Alabama Bureau of Investigation ("ABI") agent in charge of the search and seizure of Petitioner's home. A few days prior to Christmas, 1991, he received information that 30 high pressure sodium lights were shipped from a company in California to the residence of the Petitioner. The supplying company is a legitimate supplier of equipment for hydroponic supplies. The lights that were shipped are the type used to light city intersections, as well as for indoor growing of various plants and vegetables; including African violets, roses and tomatoes. It was admitted by the Government that the purchase of these lights was not, in itself, indicative of illegal drug activity.

Pursuant only to the foregoing information, West initiated a criminal investigation regarding Petitioner. West instructed members of the National Guard to conduct an aerial surveillance of Petitioner's home using an F.L.I.R. [forward looking infrared radar detector], in order to observe the amount of heat emanating from Petitioner's home. Several surveillances were conducted on January 8, 1992, at 2:30 a.m. and 6:30 a.m. and on January 17, 1992, at 2:30 p.m. and videotapes were made of the infrared images. However, there was no meter or gauge which provided a reading for comparison of Petitioner's home with others in the area. West did not participate in the actual surveillances, but simply reviewed the tapes. He had no specialized training in the area of F.L.I.R., but asserted that he was able to discern a differentiation between the heat emanating from Petitioner's home and the other homes on the tape. Yet, when asked why he conducted multiple surveillances, West stated that he was unable to get sufficient heat readings.

With only the foregoing information, West met with Bullock County, Alabama, District Judge Emfinger on January 30, 1992, at approximately 2:45 p.m. and secured a search warrant for the residence of the Petitioner.

On January 31, 1992, West secured a subpoena for the records of electricity usage at Petitioner's residence. These

records reflected that the average bill for electricity used at the home of Petitioner was approximately $400.00 a month and in December, 1991, the amount billed was $562.00. Petitioner's home is approximately 4200 square feet in size.

Additionally, on January 31, 1992, at approximately 10:00 a.m., West and other agents executed the search warrant issued by Judge Emfinger and conducted a search of Petitioner's residence. Photographs taken while the search was conducted revealed that members of the National Guard assisted in that search. West acknowledged at the hearing that members of the National Guard were specifically prohibited from actively participating in the enforcement of state laws.

At the suppression hearing, Timothy Slaughter was called as an expert witness. Mr. Slaughter is a veteran avionics technician with the United States Navy and an expert in the field of F.L.I.R. technology. He explained the methodology of the F.L.I.R. stating: "*If the target is [sic] in the picture is one that is emitting a lot more heat than the others, it will be at a stronger intensity.*" However, in reviewing and analyzing the F.L.I.R. video tapes shot during the surveillances of Petitioner's home on January 8, 1992, and January 17, 1992, Slaughter was unable to distinguish Petitioner's home as emitting any more heat than the surrounding homes.

Slaughter stated that any significant differentiation in heat emanations among the homes in that area would be easily recognizable to someone with his training.

On April 10, 1992, the district court issued an Order denying Petitioner's Motion To Suppress. (Exibit "A"). In this order, *inter alia*, the court held:

> 1. The use of an F.L.I.R. (forward looking infrared radar detector) by law enforcement without defendant's knowledge, consent or a valid search warrant did not constitute a violation of Petitioner's Fourth Amendment protection as it was not so intrusive as to constitute a warrantless search;
>
> 2. The participation of the National Guard in the search of Petitioner's home did not violate the *Posse Comitatus Act*, Title 18 **U.S.C.** §1835 and the evidence seized was not subject to the exclusionary rule; and
>
> 3. The statements contained in the affidavit supporting the issuance of the search warrant constituted probable cause. "

On June 5, 1992, Petitioner filed a Motion To Incorporate By Reference All Motions Previously Filed By Defendant and a Motion To Suppress "any and all statements made

by [the Defendants], either written or oral, to any law enforcement officers". On August 6, 1992, a hearing was had on this Motion To Suppress. At the conclusion of the proceeding, the Government rested and the court denied the Motion To Suppress.

ARGUMENT

I.

THE TRIAL COURT REVERSIBLY ERRED IN DENYING PETITIONER'S MOTION TO SUPPRESS WHERE THE USE OF AN F.L.I.R. [FORWARD LOOKING INFRARED DETECTOR] WAS SUFFICIENTLY INTRUSIVE AS TO CONSTITUTE AN ILLEGAL, WARRANTLESS SEARCH AND SEIZURE IN VIOLATION OF THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

The first issue presented to this Honorable Court by Petitioner is whether the warrantless utilization of an F.L.I.R. [forward looking infrared radar detector] by law enforcement personnel during aerial surveillance of a suspect's home, in order to visualize heat emanations escaping from that home; is sufficiently intrusive as to constitute an unreasonable "search and seizure" in violation of the proscription against warrantless searches inherent in the Fourth and Fourteenth Amendments of the **UNITED STATES CONSTITUTION.**

The Fourth Amendment of the **UNITED STATES CONSTITUTION** specifically provides:

> " The right of the people to be secure in their persons, houses, papers and

> effects, against unreasonable searches and seizures shall not be violated..." [emphasis added].

SOLDAL V. COOK COUNTY, ILL., 113 S.Ct. 538, 121 L.Ed.2d 450, *on remand,* 986 F.2d 1425, *on remand,* 1993 WL 199050 (U.S. Ill. 1992). Therefore, in the absence of a search warrant, the invasion of this constitutionally protected arena is presumptively unreasonable. **UNITED STATES V. RIEDESEL,** 987 F.2d 1383 (C.A.8 [Iowa] 1993 and **KATZ V. UNITED STATES,** 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). Since the enactment of the Fourth Amendment, rapidly expanding technological advances have forced this country's judiciary to accept an expansion of the concept of "government invasion" and revisit prior decisions related thereto. Now, not only must the courts examine purely physical intrusions to determine if there has been an infringement of this constitutional protection, but must closely scrutinize non-physical "invasions" as well. For, as was stated in **UNITED STATES V. SOLIS,** 536 F.2d 880 (9th Cir. 1976);

> "The use of sophisticated, modern, mechanical or electronic devices and the frightening implications of their possible development have led to abandonment of the test of physical trespass within the protected area and a broadening of protection to cover a reasonable expectation of privacy."

It has been held by this Court that an "expectation of privacy" is reasonable where; (1) the individual manifests a subjective expectation of privacy, and (2) society is willing to recognize that subjective expectation as reasonable. **OLIVER V. UNITED STATES,** 466 U.S. 170, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984). Clearly, the citizenry of this country has a right to a "reasonable expectation of privacy", in whatever emanations originate from the interior of a home, whether atmospheric, electronic or thermal, after reasonable efforts to contain same have been made. For, it is an expectation of society, generally accepted and well within reason, that the general populace not be subjected to arbitrary and capricious surveillance by law enforcement, through the use of electronic technology to detect personal preferences and lifestyles within their homes, including heating and cooling; in order to merely satisfy the curiosity of governmental agents.

In the present matter, ABI agent West ordered the warrantless, aerial surveillance of Petitioner's home conducted and the F.L.I.R. films taken of thermal images derived from Petitioner's home and others adjacent thereto. This search was conducted solely pursuant to information which the Government admits was, standing alone, an insufficient predicate to a reasonable presumption of criminal activity. Albeit, West did attempt to bolster justification

for this warrantless search through the procurement of the records of electricity usage at Petitioner's home. Although West compared records of Petitioner's home which is approximately 4200 square feet in size with homes of approximately 2800 square feet and he presented no consideration of extraneous contributory factors such as number of occupants, type and usage of appliances, time of year, average versus actual billing, etc.; he deemed these records to indicate that the electrical usage at Petitioner's home was excessive when compared to the usage in the other homes. Based on this assumption, West concluded that a "drug related illegal activity" must be responsible for the purported disparity. Most importantly, however, it should be noted that these records were not obtained until thirteen (13) days *after* the last surveillance was conducted. Therefore, it is averred that the utilization of these records to justify the aerial surveillance and search of Petitioner's home through the use of infrared radar devices is tantamount to an impermissible "closing of the barn door" after the departure of the proverbial horse: completely ineffective and without substance or force. In **UNITED STATES V. MITCHELL,** 951 F.2d 1291 (C.A. D.C.1991) it was held:

> "The Court must look to objective circumstances in determining the legitimacy of police conduct under the Fourth Amendment, rather than the

> officer's state of mind [at the time the officer engages in such conduct]" (emphasis added).

It is self-evident that the aerial surveillance of Petitioner's home by governmental agents and the use of the F.L.I.R. to detect and seize film thermal images of any heat emanating therefrom, particularly where evidence derived therefrom was ultimately used to obtain a criminal conviction, was sufficiently intrusive as to constitute a "search and seizure". Accordingly, where no search warrant was obtained prior to conducting these surveillances, such conduct can only be deemed to be unreasonable and unlawful, as it clearly contravenes the dictates of the **Fourth** and **Fourteenth** Amendments of the **UNITED STATES CONSTITUTION**. It is well settled that:

> "The Fourth Amendment, with few exceptions, protects citizen's right to privacy by prohibiting police from conducting searches or seizures without first obtaining warrant issued upon probable cause; to give effect to the Fourth Amendment's guarantee against unreasonable searches and seizures, and to deter illegal police conduct, the court must apply the exclusionary rule and suppress any evidence unconstitutionally obtained."

UNITED STATES V. DONNES, 752 F.Supp. 411, *reversed* 947 F.2d 1430 (D. Wyo. 1990) and **UNITED STATES V. MAXWELL,** 738 F.Supp. 1043, *clarified* 734 F.Supp. 280 (S.D.Tex. 1990).

II.

THE TRIAL COURT REVERSIBLY ERRED IN DENYING PETITIONER'S MOTION TO SUPPRESS WHERE THERE WAS INSUFFICIENT PROBABLE CAUSE TO SUPPORT THE ISSUANCE OF A SEARCH WARRANT FOR HIS RESIDENCE.

The second issue presented to this Honorable Court by Petitioner is whether law enforcement personnel and the issuing magistrate were possessed of facts sufficient to constitute "probable cause" at the time that the search warrant was issued authorizing the search of Petitioner's residence and the seizure of evidence from therein; as warrants predicated on facts insufficient to constitute requisite probable cause are *per se* unreasonable and violative of the mandates of the **Fourth** and **Fourteenth** Amendments of the **UNITED STATES CONSTITUTION.** In accordance therewith, all evidence seized pursuant thereto, or derived therefrom is inadmissible and subject to suppression under the exclusionary rule as "fruits of the poisonous tree".

Indiscriminate and unreasonable searches and seizures by law enforcement officers are proscribed by the **Fourth** Amendment of

the **UNITED STATES CONSTITUTION.** which specifically provides:

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated..." and no warrants shall issue, but *upon probable cause* supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." (emphasis added).

A police officer must have more than a "particularized hunch" or a "mere suspicion" in order to intrude upon a citizen's constitutional rights. **BRINEGAR V. UNITED STATES,** 338 U.S. 160 (1949) and **UNITED STATES V. HARRIS,** 928 F.2d 1113 (C.A.11,1991). Although facts may provide reasonable suspicions which warrant further investigation, such suspicions do not rise to the level of "probable cause"; **UNITED STATES V. DIMICK,** 990 F.2d 1164 (C.A.10 [Col.] 1993).

In order for a search warrant to be lawfully valid, it may be issued only upon a finding of probable cause. **UNITED STATES V. DANIEL,** 982 F.2d 146 (C.A.5 [Miss.] 1993); **MAPP V. OHIO,** 367 U.S. 643 (1961) and **UNITED STATES V. CORRIGAN,** 809 F.Supp. 567 (M.D. Tenn. 1992). In **UNITED STATES V. CONLEY,** 813 F.Supp 372 (W.D.Pa. 1993), the standard for determining the existence of "probable cause" sufficient to justify

issuance of a search warrant was set forth as follows:

> "Probable cause for searching a particular place exists in an affidavit when the affidavit sets forth facts constituting a *substantial basis* for finding fair probability that first, a crime has been committed; and, second, the particular place may contain fruits, instrumentalities, or evidence of the crime committed." (emphasis added).

The search warrant for Petitioner's residence was issued by the district court judge of Bullock County, Alabama, on January 30, 1992. *At the time of issuance of the warrant,* the agent requesting the warrant was possessed of the following facts only:

1. Petitioner had ordered some sodium lights from a legitimate supplier of hydroponic supplies in California. This type of light is the kind used by municipalities to illuminate street intersections and is also used for the indoor growing of certain plants, including roses and tomatoes. By West's own admission, purchase of this type of light was not indicative of criminal culpability; and

2. Three aerial surveillances of Petitioner's residence had been

> conducted by members of the National Guard. West was not present. During these surveillances, heat emissions from Petitioner's home and several other homes were captured on video tape. No attendant meter, or gauge readings were available. West, who provided only evidence of limited training and experience [attended one school, participated in two operations] in the field of F.L.I.R., admitted that multiple surveillances were conducted because he was unable to get sufficient heat readings. Yet, he asserted that he was sufficiently able to discern a notable differentiation in the amount of heat emanating from Petitioner's home in relation to the other homes.

It should be noted that this assertion was refuted by Timothy Slaughter, a veteran avionics professional with the United States Navy and an expert in the field of F.L.I.R., who testified that there was no discernible difference between the heat emanations from the various homes, including Petitioner's, captured on the videotape. Moreover, the evidence purportedly contained in the records of electricity usage was not obtained until *after* the issuance of the search warrant in question.

Therefore, unquestionably, when viewed objectively, the facts in possession of

agent West **at the time he requested the search warrant** for Petitioner's home constituted nothing more than a particularized hunch or mere suspicion of criminal activity on the part of Petitioner. They provided no *substantial basis* for believing that Petitioner had committed a crime, or that evidence of criminal activity existed in that location. Moreover, this assertion is plainly evidenced by West's attempt to bolster the underlying justification for issuing the search warrant and conducting the search of Petitioner's home by attempting to secure additional support through the records of electricity usage at Petitioner's home. Therefore, where the search warrant for Petitioner's home had no substantive basis in fact at the time it was obtained, it was illegal and all evidence obtained pursuant thereto is due to be excluded from consideration. In **UNITED STATES V. MOORE,** 956 F.2d 843 (C.A.8 [Neb.] 1992), it was held;

> " If state officers seize evidence in violation of the Fourth Amendment... the evidence **must be excluded** in [any] resulting federal prosecution." (emphasis added).

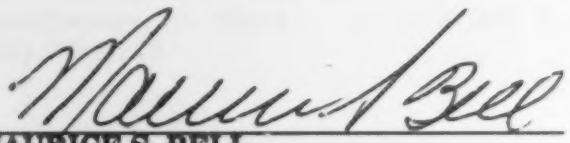
Dispositive of this issue is the decision rendered in **UNITED STATES V. KILGUS,** 571 F.2d 508 (1978) (citation omitted). In **KILGUS,** supra, the defendant was charged with, *inter alia,* the illegal importation of marijuana and possessing marijuana with the intent

to distribute. The primary evidence offered by the Government was the F.L.I.R. film results. In **KILGUS,** as is evidenced in the case at bar, the appellate court found that the officer who offered the F.L.I.R. results had no particular training or understanding of the use and operation of the equipment and there was no evidence offered to show constancy, of atmospheric conditions which affect the results of the F.L.I.R., between the three, individual surveillances conducted. Therefore, the F.L.I.R. evidence was ruled inadmissible and the defendant's conviction was overturned.

In accordance with the foregoing, it is readily apparent that the decision of the appellate court in the present case is in diametric opposition to decisions rendered by other United States Circuit Courts and the United States Supreme Court, as well as the fundamental constraints set forth in the **Fourth** and **Fourteenth** Amendments of the **UNITED STATES CONSTITUTION** and therefore, is due to be reversed.

CONCLUSION

COMES NOW, YOUR PETITIONER, Theodore Robinson, Sr., by and through counsel, and respectfully moves this Honorable Court, to grant this Petition For Writ of Certiorari and to proceed under its rules to review the matters complained of. Furthermore, Petitioner moves this Honorable Court to reverse the judgment of the Eleventh Circuit Court of Appeals and direct that court to reverse the judgment of the United States District Court for the Middle District, Northern Division, of Alabama, and remand with instructions to enter a Judgment of Acquittal; or, in the alternative, grant Petitioner's Motion To Suppress and grant Motion For New Trial.



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REQUEST FOR ORAL ARGUMENT

COMES NOW YOUR PETITIONER, Theodore Robinson, Sr., by and through counsel, and respectfully moves this Honorable Court to grant Oral Argument with respect to the issues contained herein. In support of this request, Petitioner avers that determination of these issues will be of considerable importance to the interests of the citizens of the State of Alabama, the citizenry of the United States and the general public as a whole. Furthermore, the complexity and novelty of said issues raises certain judicial inquiry; a proper resolution of which requires oral argument to sufficiently explain certain facets of the case.

Respectfully Submitted this the 20th day of February, 1996.

MAURICE S. BELL
Attorney for Petitioner Robinson
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Montgomery, Al 36104
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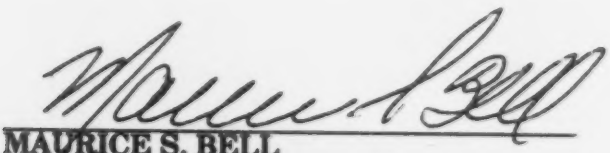
CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing upon the Honorable Redding Pitt, United States Attorney, and the Honorable Terry Moorer, Assistant United States Attorney, Middle District of Alabama, United States Attorney's Office, 1 Court Square, Suite 102, Montgomery, Alabama, 36104, by placing same in the United States Mail, postage prepaid, addressed as above, to their last known address, on this the 20th day of February, 1996.



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Supreme Court, U.S.
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(2)

No. 95-1341

In the Supreme Court of the United States

OCTOBER TERM, 1995

THEODORE ROBINSON, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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1PP

QUESTIONS PRESENTED

1. Whether the use of a Forward Looking Infrared Device (FLIR) to detect the intensity of heat emanating from petitioner's residence constituted an unreasonable search in violation of the Fourth Amendment.

2. Whether the agent's affidavit in support of a search warrant for petitioner's residence established probable cause for the search.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1341

THEODORE ROBINSON, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 20-43) is reported at 62 F.3d 1325. The orders of the district court (Pet. App. 1-8) denying petitioner's motion to suppress are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 31, 1995. A petition for rehearing was denied on November 20, 1995. Pet. App. 44-45. The petition for a writ of certiorari was filed on February 20, 1996 (a Tuesday following a federal holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After entering a conditional guilty plea in the United States District Court for the Middle District of Alabama, petitioner was convicted of manufacturing and possessing marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1); and using and carrying a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1). He was sentenced to 130 months' imprisonment, to be followed by four years of supervised release. The court of appeals affirmed. Pet. App. 20-43.

1. In December 1991, Agent Charles West of the Alabama Department of Public Safety learned that 30 high-pressure sodium lights had been shipped from California to petitioner's address in Tuskegee, Alabama. Agent West knew that such lights are often used by individuals to grow marijuana indoors. He also knew that such lights, which are commonly used to illuminate intersections on interstate highways, consume a large amount of electricity and generate a large amount of heat. Agent West subsequently learned that petitioner had ordered similar lights as well as hydroponic equipment, which is also often used to grow marijuana indoors, in 1989 and 1990. Pet. App. 26-27; Gov't C.A. Br. 2-3.

Agent West subpoenaed petitioner's utility records. The records showed that petitioner's average kilowatt consumption of 5,570 hours with an average utility statement of approximately $411 for June, July, and August of 1991 increased to nearly 10,000 kilowatt hours with a utility statement of $562 for December 1991. During his investigation, Agent West observed that petitioner owned an attractive

house with a swimming pool and a nearby lot containing a new prefabricated building, and he estimated that the house contained 2,800 square feet. Individuals who owned houses of comparable size told the agent that their monthly utility statements were between $130 and $150. Agent West learned that the 30 high-pressure sodium lights cost slightly more than $7,000 and that petitioner had paid for the lights with a cashier's check. He also determined that petitioner had not filed state income tax returns with the Alabama Department of Revenue. Pet. App. 27; Gov't C.A. Br. 3-4.

At Agent West's direction, a helicopter crew conducted aerial surveillance of petitioner's house with a Forward Looking Infrared Receiver (FLIR). The FLIR is a thermal imaging device that detects differences between the amounts of heat emitted from various sources. The differences in surface temperature are displayed on videotape as shapes ranging from black or dark grey when an object emits little heat to white when an object emits intense heat. The FLIR showed that petitioner's house was considerably warmer than the surrounding houses. Pet. App. 27-28, 39 n.2; Gov't C.A. Br. 4.

On January 30, 1992, Agent West applied for and obtained a search warrant for petitioner's house. When the warrant was executed the following day, Agent West and other agents found a large indoor marijuana growing operation in the house. They also found a shotgun, a rifle, and two revolvers near the marijuana growing operation. Pet. App. 28; Gov't C.A. Br. 4.

2. The district court denied petitioner's motion to suppress the evidence seized pursuant to the search warrant. Pet. App. 1-8. It held that the aerial FLIR

surveillance of petitioner's house did not constitute an unlawful search under the Fourth Amendment. *Id.* at 2-3. The court also concluded that Agent West's affidavit in support of the search warrant established probable cause to justify issuance of the warrant. *Id.* at 4-6.

3. The court of appeals affirmed. Pet. App. 20-43. It held that the use of the FLIR device to detect the heat emitted from petitioner's house did not constitute an unreasonable search under the Fourth Amendment. *Id.* at 29-34. The court noted that "a party alleging an unconstitutional search under the Fourth Amendment must establish *both* a subjective and objective expectation of privacy to succeed." *Id.* at 29-30. The court concluded that petitioner had not satisfied either component of that two-part test. Because "the record d[id] not indicate that [petitioner] affirmatively took any action to prevent the resulting heat from being emitted into the atmosphere above his house," the court held that petitioner "ha[d] not established a subjective expectation of privacy in this heat emitted from his home." *Id.* at 31. In addition, the court concluded that petitioner had "failed to establish an objective or reasonable expectation of privacy in the heat emitted from his house resulting from the unlawful marijuana cultivation inside, even if he had met the subjective component" of the applicable constitutional test. *Id.* at 34. The court was "unconvinced that society would ever accept use of the Fourth Amendment to shield unlawful activity within one's home when there are noninvasive methods of detecting such criminal activity through legitimate byproducts, such as the heat at issue in this case." *Ibid.*

The court of appeals also held that Agent West's affidavit in support of the search warrant established probable cause to justify issuance of the warrant. Pet. App. 34-37. The court explained that "[t]he thermal imagery evidence in addition to the cumulative impact of the other evidence amply demonstrated a fair probability that marijuana cultivation was occurring in [petitioner's] house." *Id.* at 37. "Notwithstanding the additional evidence obtained from the aerial FLIR surveillance," the court "note[d] that the weight of the other evidence would have provided sufficient probable cause for issuance of the search warrant in question." *Id.* at 36.

Judge Edmondson concurred. Pet. App. 38. He admitted to "considerable doubt" on the question "whether [petitioner] had a subjective expectation of privacy in the heat generated by his indoor marijuana cultivation." *Ibid.* Because he "believe[d] the subjective intent issue could be decided either way without affecting the outcome of *this* case," Judge Edmondson "decline[d] to decide the unnecessary and * * * delicate question of subjective intent." *Ibid.*

ARGUMENT

1. Petitioner contends (Pet. 9-14) that the use of the FLIR device during the aerial surveillance of his residence constituted an unreasonable search under the Fourth Amendment. The court of appeals' decision rejecting that claim is correct and does not conflict with any decision of this Court or of any other court of appeals. Moreover, the agent's affidavit in support of the search warrant in this case established probable cause to justify the issuance of the search warrant even in the absence of the results of the FLIR surveillance.

This Court employs a two-part test to determine whether an individual has a constitutionally protected expectation of privacy in an object or location: "[F]irst, has the individual manifested a subjective expectation of privacy in the object of the challenged search? Second, is society willing to recognize that expectation as reasonable?" *California* v. *Ciraolo*, 476 U.S. 207, 211 (1986); see also *Oliver* v. *United States*, 466 U.S. 170, 177 (1984); *Katz* v. *United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). In *Ciraolo*, the Court held that a police overflight of a private residence did not require a warrant. The Court concluded that an individual has no reasonable expectation of privacy in an area (the backyard of his home) that is visible to the naked eye from an aircraft in navigable airspace. 476 U.S. at 212-214; see also *Florida* v. *Riley*, 488 U.S. 445, 449-452 (1989) (plurality opinion). In *Dow Chemical Co.* v. *United States*, 476 U.S. 227, 234-239 (1986), the Court similarly held that the use of an aerial mapping camera to photograph an industrial manufacturing complex from navigable airspace did not require a warrant.

In this case, petitioner did not satisfy either component of the applicable two-part test. First, petitioner did "not establish[] a subjective expectation of privacy in th[e] heat emitted from his home." Pet. App. 31. As the court of appeals explained, "[w]hile [petitioner] attempted to conceal his marijuana growing operation by conducting it inside his home, the record does not indicate that he affirmatively took any action to prevent the resulting heat from being emitted into the atmosphere above his house." *Id.* at 30-31. Because "[petitioner's] *inaction* regarding the heat generated from his marijuana cultivation demonstrate[d] his lack of concern for it[,]" he had not

manifested a subjective expectation of privacy in the object of the challenged search. *Id.* at 31.

Second, even if petitioner had a subjective expectation of privacy in the level of heat emitted from his residence, it was not a legitimate expectation worthy of societal protection. In *Ciraolo*, this Court emphasized that "'[t]he test of legitimacy is not whether the individual chooses to conceal assertedly "private" activity,' but instead 'whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment.'" 476 U.S. at 212 (quoting *Oliver* v. *United States*, 466 U.S. at 181-183). Here, as the court of appeals correctly explained, "[n]o revelation of intimate, even definitive, detail within the house was detectable [by the FLIR surveillance]; there was merely a gross, nondiscrete bright image indicating the heat emitted from the residence." Pet. App. 32. Moreover, "there was no intrusion whatsoever into [petitioner's] home because the emitted heat rose from his house and then was measured by FLIR surveillance." *Id.* at 33. Hence, "[n]one of the interests which form the basis for the need for protection of a residence, namely the intimacy, personal autonomy and privacy associated with a home, are threatened by [FLIR] thermal imagery." *Id.* at 33-34 (quoting *United States* v. *Pinson*, 24 F.3d 1056, 1059 (8th Cir.), cert. denied, 115 S. Ct. 664 (1994)).

In *Dow Chemical*, this Court acknowledged that "surveillance of private property by using highly sophisticated surveillance equipment not generally available to the public, such as satellite technology, might be constitutionally proscribed absent a warrant." 476 U.S. at 238. The Court went on to explain, however, that

> the photographs here are not so revealing of intimate details as to raise constitutional concerns. Although they undoubtedly give EPA more detailed information than naked-eye views, they remain limited to an outline of the facility's buildings and equipment. The mere fact that human vision is enhanced somewhat, at least to the degree here, does not give rise to constitutional problems. An electronic device to penetrate walls or windows so as to hear and record confidential discussions of chemical formulae or other trade secrets would raise very different and far more serious questions.

Id. at 238-239 (footnote omitted). The Court thus focused on the potential of a particular surveillance technique to reveal information that is genuinely private.

In this case, "the FLIR surveillance revealed only that [petitioner's] house emitted significantly more heat than others in the neighborhood of similar size." Pet. App. 32. As the court of appeals explained, "[s]uch heat detection with thermal imagery is not the 'functional equivalent of an X-ray machine in that it allows officers to "see" within a structure what it otherwise cannot see with the naked eye.'" *Id.* at 32-33 (quoting *United States* v. *Ishmael*, 48 F.3d 850, 856 (5th Cir.), cert. denied, 116 S. Ct. 74, 75 (1995)). Rather, the thermal imaging technique is more nearly comparable to conventional photography. While conventional photography records the image of an object based on the object's emission of radiation from the visible portion of the electromagnetic spectrum, thermal imaging simply records images based on the object's emissions from the infrared portion of the

electromagnetic spectrum. Quite unlike x-ray photography, thermal imaging merely produces a picture of the surface temperature of the exterior of an object based on the radiation that object emits. Because the FLIR device does not penetrate the walls or otherwise reveal what is occurring within a residence, its use does not "infringe[] upon the personal and societal values protected by the Fourth Amendment." *Ciraolo*, 476 U.S. at 212 (quotation omitted).[1]

Although petitioner asserts (Pet. 13) that it is "self-evident" that the use of FLIR device is "sufficiently intrusive" to constitute a search, the court of appeals' decision in this case is consistent with the decisions of the other courts of appeals that have ruled on the issue. Like the court of appeals here, the Fifth, Seventh, and Eighth Circuits have held that the use of a thermal imaging device to detect heat emanating from a structure does not constitute an unreasonable search. *Ishmael*, 48 F.3d at 853-857; *United States* v. *Myers*, 46 F.3d 668, 669-670 (7th Cir.), cert. denied, 116 S. Ct. 213 (1995); *Pinson*, 24 F.3d at 1058-1059.[2]

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[1] The use of the FLIR device in this case was no more intrusive than the warrantless use of a trained drug detection dog to sniff luggage in a public place that was upheld in *United States* v. *Place*, 462 U.S. 696, 707 (1983). As the court of appeals observed, "[j]ust as odor escapes a compartment or building and is detected by the sense-enhancing instrument of a canine sniff, so also does heat escape a home and is detected by the sense-enhancing infrared camera." Pet. App. 33 (quoting *Pinson*, 24 F.3d at 1058).

[2] In *United States* v. *Cusumano*, 67 F.3d 1497, 1499-1509 (1995), a panel of the Tenth Circuit ruled that the use of a thermal imaging device to detect heat emitted from a residence violated the Fourth Amendment. On December 5, 1995,

Even if the question presented warranted review by this Court, moreover, the instant case would be an inappropriate vehicle for its resolution. The court of appeals concluded that Agent West's affidavit would have established probable cause to search petitioner's home even in the absence of the information it contained regarding thermal imaging. See Pet. App. 36; page 11, *infra*. A determination that use of the FLIR device was improper therefore would not entitle petitioner to suppression of the evidence seized pursuant to the search warrant. Cf. *Nix* v. *Williams*, 467 U.S. 431, 443 (1984) ("the interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a *worse*, position that they would have been in if no police error or misconduct had occurred").

2. Petitioner also contends (Pet. 14-19) that Agent West's affidavit in support of the search warrant for his residence did not establish probable cause for issuance of the search warrant. That fact-bound contention does not warrant this Court's review.

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however, the Tenth Circuit vacated the panel's decision in *Cusumano* and granted rehearing en banc in that case.

In *United States* v. *Kyllo*, 37 F.3d 526, 530-531 (1994), the Ninth Circuit found that the record was insufficiently developed to determine whether the use of a thermal imaging device to scan the defendant's residence constituted a search. The Ninth Circuit remanded for an evidentiary hearing on the technological capacities of the thermal imaging device used in that case. See also *United States* v. *Domitrovich*, 852 F. Supp. 1460, 1472-1475 (E.D. Wash. 1994), aff'd on other grounds, 57 F.3d 1078 (9th Cir. 1995) (Table); *United States* v. *Penny-Feeney*, 773 F. Supp. 220, 225-228 (D. Haw. 1991), aff'd on other grounds, 984 F.2d 1053 (9th Cir. 1993).

The court of appeals correctly concluded that "[t]he thermal imagery evidence in addition to the cumulative impact of the other evidence amply demonstrated a fair probability that marijuana cultivation was occurring in [petitioner's] house." Pet. App. 37. Moreover, "[n]otwithstanding the additional evidence obtained from the aerial FLIR surveillance," the court of appeals found that "the weight of the other evidence would have provided sufficient probable cause for issuance of the search warrant in question." *Id.* at 36. In addition to the results of the FLIR surveillance, Agent West's affidavit in support of the search warrant showed that (1) petitioner had ordered and received 30 high-pressure sodium lights from a California company specializing in indoor growing equipment and had paid for the lights with a cashier's check in excess of $7,000; (2) petitioner had purchased other growing equipment from the same company in the past; (3) high-pressure sodium lights can be used to grow marijuana indoors; (4) high-pressure sodium lights consume a large amount of electricity and generate a large amount of heat; (5) the electrical consumption for petitioner's residence increased in the month that he received the high-pressure sodium lights and was higher than for houses of comparable size;[3] and (6) petitioner lived in an attractive house

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[3] The record clearly contradicts petitioner's repeated assertions (Pet. 6, 12, 16-17) that Agent West did not subpoena and obtain the utility records showing the electrical consumption for petitioner's residence until January 31, 1992—the day after the agent applied for and obtained the search warrant on January 30, 1992. At the suppression hearing, Agent West acknowledged that his written report dated February 5, 1992, stated that he had served the subpoena on Dixie Electric Cooperative on January 31, 1992. Agent West testified, how-

with a swimming pool in an affluent area but had not filed state income tax returns. *Id.* at 35-36. The court of appeals therefore correctly concluded that the agent's affidavit in support of the search warrant for petitioner's residence established probable cause with or without the additional information provided by the FLIR surveillance. That fact-specific determination does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
JOSEPH C. WYDERKO
Attorney

APRIL 1996

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ever, that that date was not correct and that he believed the correct date was January 3, 1992. 4/7/92 Tr. 14-15. Moreover, since the agent's affidavit in support of the search warrant discusses the utility records and states that they had been obtained by subpoena, it is clear that Agent West obtained the utility records before he applied for the search warrant. 1/30/92 Affidavit 1.

Supreme Court, U.S.
FILED
95 1341 FEB 20 1996
OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

THEODORE ROBINSON, SR.,
Petitioner,
vs.
THE UNITED STATES OF AMERICA,
Respondent.

On Appeal From the United States Court of Appeals for the Eleventh Circuit

---

PETITION FOR WRIT OF CERTIORARI

APPENDIX OF EXHIBITS

MAURICE S. BELL
547 South Lawrence Street
Montgomery, Al 36104
(334) 262-2719

Counsel of Record
For Petitioner

47pp

EXHIBITS

The following exhibits contain both motions filed by your petitioner and orders of the courts in response thereto. In order to comply with the pagination/printing requirements of rule 33.1(c) **Federal Rules of Procedure,** all motions and orders issued by the United States District Court for the Middle District of Alabama, Northern Division and the United States Court of Appeals for the Eleventh Circuit have been re-paginated.

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EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	CR. NO. 92-66-N
	)	
THEODORE ROBINSON, SR.	)	

O R D E R

Now before the Court is defendant's motion to suppress filed March 20, 1992 and amended March 26, 1992. The government responded to the motion on April 1, 1992. Both parties have filed briefs in support of their positions. On April 7, 1992, the Court conducted a hearing on defendant's motion to suppress. for the following reasons, the court determines that defendant's motion is due to be denied.

Defendant's motion asks the Court to suppress the evidence removed from the premises and curtilage of defendant's residence. As grounds for his motion, defendant asserts (1) that the search of his property and seizure of the alleged contraband which occurred on or about January 31, 1992 were in violation of the Fourth Amendment of the Constitution of the United States since it was by use of a forward

looking infrared detector (FLIR); (2) that the search and seizure were in violation of 18 **U.S.C.** § 1385, known as the Posse Comitatus Act because uniformed members of the Alabama National Guard participated in the search and seizure; and (3) that the statements in the affidavit in support of the search warrant issued in this cause do not constitute probable cause.

The Court first considers whether the use of a FLIR without defendant's knowledge, consent or a valid search warrant was in violation of the Fourth Amendment of the United States Constitution. On January 17, 1992, a helicopter owned by the Alabama Department of Public Safety (DPS), operated by employees of DPS, and equipped with a FLIR flew over defendant's residence and directed its heat detection sensors toward defendant's house. The FLIR registers emanations of heat and indicates the intensity of heat emanating from a given source with gradations of light and dark. On January 17, 1992, the FLIR detected a greater amount of heat emanating from defendant's house than from other houses of comparable size in the area.

Defendant contends that because the gradations of light detected by the FLIR are not visible to the naked eye, the use of FLIR constitutes a warrantless search of defendant's house. The FLIR detects only the presence of heat emanations. The FLIR does not detect the source of the heat nor provide any information regarding activity

within an enclosed space such as defendant's house. Based on the information before it, the Court does not consider the use of the FLIR to be so intrusive as to constitute an unlawful search. Defendant argues that the use of the FLIR to detect heat emanations is analogous to capturing sound waves with bugging devices. This analogy ignores the nature of the information acquired by the different processes. The FLIR detects only the presence of heat. Bugging devices, on the other hand, capture more than the presence of sound; they detect the content of the speech and identity of the speaker.

Defendant further contends that the search and seizure conducted on January 31, 1992 violated the Posse Comitatus Act, 18 **U.S.C.** § 1385. Military involvement in a case must be "pervasive" in order to constitute a violation of the Posse Comitatus Act. **Hayes v. Hawes,** 921 F.2d 100 (7th Cir. 1990) (citing **United States v. Hartley,** 796 F.2d 112, 114 (5th Cir. 1986). Further, assistance by the military in civil investigations does not violate the Possee Comitatus Act where military participation does not "pervade the activities of civilian officials, and d[oes] not subject the citizenry to the regulatory exercise of military power." **United States v. Bacon,** 851 F.2d 1312, 1313 (11th Cir. 1988).

The evidence presented indicates that the two National Guardsmen present at the time of the search of defendant's residence and seizure of the alleged contra-

band were not used to execute the search nor to determine what to seize. Rather, the National Guardsmen followed the instructions of Alabama DPS Agent Charles West and assisted only in removing the alleged contraband from the premises. The evidence shows that the National Guardsmen present on January 31, 1992 did nothing other than assist in removing the alleged contraband from defendant's residence. This participation does not constitute a violation of the Posse Comitatus Act.

Moreover, even if this evidence was seized in violation of the Posse Comitatus Act, the exclusionary rule does not apply to evidence seized in violation of the Act, unless there are widespread and repeated violations of the Act. **United States v. Wolffs,** 594 F.2d 77, 85 (5th Cir. 1979). *See also* **Hayes v. Hawes,** 921 F.2d 100, 104 (7th Cir. 1990); **United States v. Hartley,** 678 F.2d 961, 978 n. 23 (11th Cir. 1982), *cert. denied* 459 &.S. 1170 (1983; **United States v. Garcia,** 672 F.2d 1349, 1368 n. 33 (11th Cir. 1982). Defendant alleges no widspread and repeated violations of the Posse Comitatus Act nor is there evidence of such violations. Even if defendant had established that the evidence was seized in violation of the Posse Comitatus Act, he has not alleged sufficient widespread violations to justify suppression of the evidence seized from his residence.

In addition, the statements in the affidavit given in support of the search warrant subsequently issued in this cause

do constitute probable cause. Defendant contends that the statements contained in the affidavit are conclusory and, as such, do not provide a basis for determining the existence of probable cause. Alabama DPS Narcotics Agent Charles West, who has investigated narcotics offenses for over 21 years and has been involved with search warrants pertaining to the indoor growing of marijuana, gave the affidavit in support of the search warrant. West states in his affidavit that defendant had ordered 30 high pressure sodium lamps from a firm in California which specializes in indoor growing equipment and hydroponics supplies and paid for the lamps with $7000 cashier's check. Defendant had purchased growing equipment from the company in 1990 as well. Based on his experience and training, West was aware that high pressure sodium lamps are used in the indoor growing of marijuana and that the lamps consume a large quantity of electricity and radiate much heat. West subpoenaed the records of the Dixie Electric Cooperative and learned that the electric consumption of defendant's residence was markedly higher than that of comparably-sized houses. For example, defendant used an average of 5,570 kilowatt hours for June, July and August and had an average bill of $410.89. Comparably-sized houses have electric bills ranging from $130 to $150 per month. In his affidavit, West stated that, on January 17, 1992, a helicopter equipped with a FLIR flew over defendant's residence and dected heat ema-

nating from the structure as described above. Several days later, West received information that no record of income tax returns filed by defendant could be found.

Probable cause exists where the facts and circumstances within the investigating agent's knowledge and which are reasonably trustworthy are sufficient to warrant the belief that an offense is being committed. **Brinegar v. United States,** 338 U.S. 160, 175-76 (1949). The Court does not consider the facts described by West to be conclusory statements. Rather, West gathered information from reliable sources and found that the facts conformed to a pattern consistent with the indoor cultivation of marijuana. West's affidavit, therefore, offers probable cause for issuing a warrant to search the premises and curtilage of defendant's residence.

Accordingly, the Court ORDERS that defendant's motion to suppress is DENIED.

DONE this 10th day of April, 1992.

/s/ TRUMAN HOBBS

TRUMAN HOBBS
UNITED STATES DISTRICT JUDGE

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
	)	
VS.	)	CR. NO. 92-66-N
	)	
	)	
THEODORE ROBINSON, SR.; and EVA H. ROBINSON	)	

O R D E R

This cause is now before the Court on the Motion to Suppress filed herein June 5, 1992, by Defendant, Theodore Robinson, Sr., requesting this Court to suppress "any and all statements made by [the Defendants], either written or oral, to any law enforcement officer."[1]

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[1] The Court is referring to the Motion to Suppress filed June 5, 1992, by Defendant, Theodore Robinson, Sr. However, this Order will apply to both Defendants because on June 18, 1992, U.S. Magistrate Judge Coody granted the Motion to Adopt and Conform Applicable Motions of Co-Defendant filed June 16, 1992, by Defendant, Eva H. Robinson.

On June 17, 1992, U. S. District Judge Truman Hobbs ordered Mr. Robinson to "file forthwith notice of which statements he seeks to suppress and the grounds for his motion" [emphasis added]. Defendant, Theodore Robinson, Sr., having failed to respond to Judge Hobbs' June 17, 1992, Order and Defendant, Eva H. Robinson, having adopted all motions previously filed by her co-Defendant, it is ORDERED by this Court that the Motion to Suppress filed herein June 5, 1992, be, and the same is hereby, DENIED.

DONE this 1st day of July, 1992.

/s/ R. E. VARNER

R. E. VARNER
UNITED STATES DISTRICT JUDGE

EXHIBIT C

AO 245S(Rev.4/90)(M.D. Ala. rev.)
Sheet 1 - Judgment in a Criminal Case

UNITED STATES DISTRICT COURT
Middle District of Alabama
Northern Division

UNITED STATES OF AMERICA

v. Case Number
CR 92-66-N-001

THEODORE ROBINSON, SR.
Defendant.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or
After November 1, 1987)

The defendant, THEODORE ROBINSON, SR., was represented by Donald E. Fazekas.

The defendant pleaded guilty to Counts I and II. Accordingly, the defendant is adjudged guilty of such counts, involving the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 USC 841 (a) (1) and 18 USC 2	Controlled Substances Act Aiding Abetting	1/30/92	I
18 USC 924 (c)(1)	Gun Control Act	1/30/92	II

As pronounced on October 23, 1992, the defendant is sentenced as provided in pages 2 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the Clerk, U.S. District Court, a special assessment of $100, for Counts I and II, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this the 3rd day of November, 1992.

/s/ W. Harold Albritton
United States District Judge

Defendant's SSAN: 424-38-4985
Defendant's Date of Birth: 10/31/35
Defendant's Address: Route 1, 268Y; Union Springs, AL 36089

AO 245 S (Rev. 4/90) (M.D. Ala. rev.)
Sheet 2 - Imprisonment

Judgment—Page 2 of 4

Defendant: THEODORE ROBINSON, SR.
Case Number: CR 92-66-N-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 130 months. This term consists of terms of 70 months on Count I and 60 months on Count II to be served consecutively to the term on Count I.

The defendant shall be continued and under the same release conditions imposed by the U. S. Magistrate Judge on February 28, 1992 pending disposition of his appeal.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ _____to_____

at_____, with a certified copy of this Judgment.

_____

United States Marshal

By _____

Deputy Marshal

AO 245S (REV. 4/90)(M.D.Ala. rev.)
Sheet 3 - Supervised Release

Judgment—Page 3 of 4

Defendant: THEODORE ROBlNSON, SR.
Case Number CR 92-66-N-001

SUPERVISED RELEASE

Upon release from imprisonment the defendant shall be on supervised release for a term of 4 years on Count I and 3 years on Count II, all such terms to run concurrently.

While on supervised release, the defendant shall not commit another federal, state or local crime; shall not illegally possess a controlled substance; shall comply with the standard conditions that have been adopted by this court (set forth below); and shall comply with the following additional conditions:

1. If ordered to the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

2. If this judgment imposes a fine, special assessments, costs or restitution

obligation, it shall be a condition of supervised release that the defendant pay as ordered any such fine, assessment, costs and restitution that remain unpaid at the commencement of the term of supervised release.

3. The defendant shall not own or possess a firearm or destructive device.

4. The defendant shall submit to a drug test when ordered to do so by the Probation Officer. If determined necessary by the Probation Officer, the defendant shall participate in a substance abuse treatment program as directed by the Probation Officer.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

1) The defendant shall not leave the judicial district without the permission of the court or probation officer.

2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.

3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

4) The defendant shall support his or her dependents and meet other family responsibilities.

5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

6) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.

7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances.

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any

person convicted of a felony unless granted permission to do so by the probation officer.

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

AO 245S (REV. 4/90)(M.D.Ala. rev.)
Sheet 7 - Statement of Reasons

Defendant: THEODORE ROBINSON, SR.
Case Number: CR 92-66-N-001

STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report.

Guideline Range Determined by the Court:	
Total Offense Level:	26
Criminal History Category:	1
Imprisonment Range:	Ct. I: 63 months to 78 months Ct.II: 5 years
Supervised Release Range:	Ct. I: 4 to 5 years Ct.II: 2 to 3 years

Fine Range:	$ 12,500 to $ 2,000,000
Restitution:	S .00

The fine is waived or is below the guideline range because of the defendant's inability to pay.

The Court finds that, pursuant to 18 **U.S.C.** Section 3663, there is no identifiable victim who incurred a financial loss as a result of this offense, therefore, an order of restitution is not entered.

The sentence is within the guideline range, that range does not exceed 24 months, and the Court finds no reason to depart from the sentence called for by the application of the guidelines.

The Court finds that the sentence imposed is consistent with the factors stated at 18 U.S.C. Section 3553(a) to be considered in imposing a sentence.

EXHIBIT D

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62 F.3d 1325, U.S. v. Robinson, (C.A.11 (Ala.) 1995)

UNITED STATES of America, Plaintiff-Appellee,

v.

Theodore ROBINSON, Sr., Defendant-Appellant.

Nos. 92-6951, 92-6991.
United States Court of Appeals,
Eleventh Circuit.
Aug. 31, 1995.

Defendant pled guilty in the United States District Court for the Middle District of Alabama, No. CR-92-66-N(01), Truman M. Hobbs, J., to manufacture and possession of marijuana with intent to distribute and possession of firearms in connection with drug trafficking crime. He appealed the denial of his suppression motion. The Court of Appeals, Birch, Circuit Judge, held that: (1) aerial surveillance of occupied, private residence with infrared thermal detection was not an unconstitutional search, and (2) probable cause existed to search defendant's home.

Affirmed.

Edmondson, Circuit Judge, concurred and filed an opinion.

1. CRIMINAL LAW k1139
110 —
110XXIV Review
110XXIV(L) Scope of Review in General
110k1139
Additional proofs and trial de novo.

[See headnote text below]

1. CRIMINAL LAW k1158(4)
110 —
110XXIV Review
110XXIV(O) Questions of Fact and Findings
110k1158 In General
110k1158(4) Reception of evidence.

C.A.11 (Ala.) 1995.

Decisions on motions to suppress involve mixed questions of fact and law, and district court's factual findings are reviewed for clear error, while application of law to the facts is reviewed *de novo*, construing all facts in favor of the prevailing party.

2. SEARCHES AND SEIZURES k26
349 —
349I In General
349k25 Persons, Places and Things Protected
349k26 Expectation of privacy.

C.A.11 (Ala.) 1995.

Even if defendant demonstrates subjective expectation of privacy in the object of the search, he also must establish that this expectation is objectively reasonable; under this prong of *Katz*, inquiry is whether government's intrusion infringes upon personal and societal values protected by the Fourth Amendment. U.S.C.A. Const.Amend. 4.

3. SEARCHES AND SEIZURES k13.1
349 —
349I In General
349k13 What Constitutes Search or Seizure
349k13.1 In general.

C.A.11 (Ala.) 1995.

Use of infrared surveillance to ascertain heat intensity in a home is analogous, for Fourth Amendment purposes, to warrantless use of drug-detecting dogs to locate contraband. U.S.C.A. Const. Amend. 4.

4. SEARCHES AND SEIZURES k20
349 —
349I In General
349k13 What Constitutes Search or Seizure
349k20 Aerial surveillance.

C.A.11 (Ala.) 1995.

Aerial surveillance of defendant's home with infrared thermal detection was not an

unreasonable "search" violative of the Fourth Amendment; defendant lacked subjective expectation of privacy in the heat emitted from his home, and, even if defendant subjectively expected privacy, such expectation with regard to heat rising from his house was not objectively reasonable; moreover there was no intrusion whatsoever into defendant's home. U.S.C.A. Const.Amend.

See publication Words and Phrases for other judicial constructions and definitions.

5. SEARCHES AND SEIZURES k191
349 —
349VI Judicial Review or Determination
349k191 In general; conclusiveness of warrant in general.

C.A.11 (Ala.) 1995.

Whether search affidavit provides sufficient facts to establish probable cause is legal question subject to complete and independent appellate review. U.S.C.A. Const.Amend. 4.

6. SEARCHES AND SEIZURES k191
349 —
349VI Judicial Review or Determination
349k191 In general; conclusiveness of warrant in general.

C.A.11 (Ala.) 1995.

Great deference is accorded to judicial determination of probable cause to issue search warrant. U.S.C.A. Const.Amend. 4.

7. SEARCHES AND SEIZURES k113.1
349 —
349II Warrants
349k113 Probable or Reasonable Cause
349k113.1 In general.

C.A.11 (Ala.) 1995.

In issuing valid search warrant, judge is simply to make practical, commonsense decision whether, given all circumstances set forth in the affidavit, there is fair probability that contraband or evidence of the crime would be found in a particular place. U.S.C.A. Const.Amend. 4.

8. DRUGS AND NARCOTICS k188(2)
138 —
138II Narcotics and Dangerous Drugs
138II(D) Searches and Seizures
138k186 Search Under Warrant
138k188 Affidavits, Complaints, and Evidence for Issuance of Warrants
138k188(2) Probable cause in general.

C.A.11 (Ala.) 1995.

There was probable cause to believe that defendant was cultivating marijuana in his home, even without considering infrared thermal surveillance results, where defendant ordered thirty high-pressure sodium lights from company specializing in indoor growing equipment and paid for them with a cashier's check in excess of $7,000.00; defendant had purchased growing equipment from this company in past, investigating officer knew from experience and training that such lights are

used for indoor marijuana cultivation and that they consumed large amounts of electricity and radiated much heat, defendant's electric bills showed higher electrical consumption than that for houses of comparable size, visual inspection of the property showed attractive house with swimming pool in affluent neighborhood, yet no record of defendant's having paid state income taxes could be located. U.S.C.A. Const.Amend. 4.

9. SEARCHES AND SEIZURES k119
349 —
349II Warrants
349k115 Competency of Information; Hearsay
349k119 Citizens, victims, or officers.

C.A.11 (Ala.) 1995.
Opinions and conclusions of experienced agent regarding set of facts are properly considered in equation as to probable cause for issuing a search warrant. U.S.C.A. Const.Amend. 4.

10. DRUGS AND NARCOTICS k188(2)
138 —
138II Narcotics and Dangerous Drugs
138II(D) Searches and Seizures
138k186 Search Under Warrant
138k188 Affidavits, Complaints, and Evidence for Issuance of Warrants
138k188(2) Probable cause in general.

C.A.11 (Ala.) 1995.
Evidence of extremely high power bill

is one factor justifying issuance of warrant to search for indoor marijuana cultivation. U.S.C.A. Const.Amend. 4.

***1327** Habib Yazdtchi, Montgomery, AL, for Theodore Robinson, Sr.

Redding Pitt, U.S. Atty., Terry F. Moorer, Asst. U.S. Atty., Montgomery, AL, for appellee in No. 92-6951.

James E. Wilson, U.S. Atty., Terry F. Moorer, Asst. U.S. Atty., Montgomery, AL, for appellee in No. 92-6991.

Appeals from the United States District Court for the Middle District of Alabama.

Before EDMONDSON and BIRCH, Circuit Judges, and HILL, Senior Circuit Judge.

BIRCH, Circuit Judge:

In this appeal, we decide whether aerial surveillance of an occupied, private residence with infrared thermal detection as an indication that marijuana is being cultivated inside is an unconstitutional search. The district court denied defendant's suppression motion. We AFFIRM.

I. BACKGROUND

In December, 1991, a Drug Enforcement Administration agent informed Agent Charles West of the Narcotics Division of the Alabama Department of Public Safety that thirty high-

pressure, sodium lights had been shipped from California to defendant-appellant Theodore Robinson, Sr.'s address in Tuskegee, Alabama. Agent West knew that such lights commonly are used by private individuals for growing marijuana indoors. (FN1) His investigation revealed that Robinson had ordered similar lights and hydroponic equipment in 1989 and 1990.

Additionally, subpoenaed utility records showed that Robinson's average kilowatt consumption of 5,570 hours and average utility statement of $410.89 for the months of June, July and August, 1991, had increased to nearly 10,000 kilowatt hours for December, 1991, and a utility statement of $562.00. Houses approximately the size of Robinson's generated monthly power statements between $130.00 and $150.00. Agent West's investigation of Robinson's financial status showed that Robinson owned an attractive house of approximately 2,800 square feet with a swimming pool and a nearby lot containing a new, prefabricated metal building. Although Robinson paid for the high-pressure, sodium lights with a cashier's check in excess of $7,000.00, Agent West found that the Alabama Department of Revenue had no record of Robinson's having filed income tax returns.

After collecting this information, Agent West directed a helicopter crew to conduct a Forward Looking Infrared Receiver ("FLIR"), thermal imaging examination (FN2) to compare the heat emanating from Robinson's house with

the intensity of the heat from surrounding objects. Robinson's home was considerably warmer than surrounding houses. Listing his investigatory findings, Agent West applied for a search warrant of Robinson's home. On January 31, 1992, Agent West and others executed the search warrant and found a major, indoor marijuana growing operation. (FN3) Two revolvers, a shotgun, and a ***1328** rifle also were found near the marijuana cultivation in Robinson's house.

A two-count indictment in the Middle District of Alabama charged Robinson with the manufacture and possession of marijuana with intent to distribute and with possession of firearms in connection with a drug trafficking crime. Robinson moved to suppress the marijuana seized from his home pursuant to the search warrant. Following a suppression hearing, the district court denied his motion. Robinson then pled guilty and was sentenced to serve 130 months of imprisonment followed by seven years of supervised release. On appeal, he contends that the FLIR search of his house constituted an illegal search under the Fourth Amendment, and that there were insufficient facts for probable cause to issue the warrant to search his house.

II. DISCUSSION

[1] Decisions on motions to suppress involve mixed questions of fact and law; "we review the district court's factual

findings for clear error, and its application of the law to the facts de novo." *United States v. Hromada, 49 F.3d 685, 688 (11th Cir.1995)*. Additionally, we construe all facts in favor of the prevailing party. Id. Robinson first argues that the warrantless FLIR surveillance of his occupied home violated his Fourth Amendment rights.

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. In *United States v. Ford, 34 F.3d 992 (11th Cir.1994)*, we held that the ground surveillance of an unoccupied mobile home on leased land with a thermal infrared heat detector did not violate the Fourth Amendment. Three other circuits also have concluded that thermal infrared surveillance or FLIR is not an unconstitutional search. *United States v. Ishmael, 48 F.3d 850 (5th Cir.1995); United States v. Myers, 46 F.3d 668 (7th Cir.1995); United States v. Pinson, 24 F.3d 1056 (8th Cir.), cert. denied, — U.S. —, 115 S.Ct. 664, 130 L.Ed.2d 598 (1994)*. Robinson argues that this case is distinguished from *Ford* because it involves an occupied home, which specifically implicates the Fourth Amendment. As we explain, our *Ford* analysis also applies to the aerial FLIR surveillance of Robinson's home.

In *Ford*, we recognized that a party alleging an unconstitutional search under

the Fourth Amendment must establish both a subjective and an objective expectation of privacy to succeed. *Ford, 34 F.3d at 995 (citing Katz v. United States, 389 U.S. 347, 361, 88 S.Ct. 507, 516, 19 L.Ed.2d 576 (1967)* (Harlan, J., concurring)). The subjective component requires that a person exhibit an actual expectation of privacy, while the objective component requires that " 'the [privacy] expectation be one that society is prepared to recognize as "reasonable." ' " *Id.* (quoting *Katz, 389 U.S. at 361, 88 S.Ct. at 516* (Harlan, J., concurring)). Thus, we must determine whether Robinson had a subjective expectation of privacy that society would recognize as objectively reasonable.

Our conclusion in *Ford* that the defendant-appellant held no subjective expectation of privacy turned on his purposefully venting the heat from his marijuana cultivation inside the mobile home with an electric blower through holes drilled in the floor. *Id.* In contrast to *Ford,* Robinson did not vent the heat from his marijuana growing operation or deliberately assist the emission of heat in any way. Consequently, we must decide in this case whether inaction can be as revealing regarding the subjective expectation of privacy as action.

The focal issue is whether Robinson had a subjective expectation of privacy in the heat generated by his indoor marijuana cultivation. (FN4) We find none. While

Robinson attempted ***1329** to conceal his marijuana growing operation by conducting it inside his home, the record does not indicate that he affirmatively took any action to prevent the resulting heat from being emitted into the atmosphere above his house. The record shows no consideration for the emitted heat whatsoever until his indictment and knowledge of the FLIR surveillance, which measured solely heat expelled into the atmosphere from Robinson's home. Robinson's inaction regarding the heat generated from his marijuana cultivation demonstrates his lack of concern for it. Thus, we conclude that Robinson has not established a subjective expectation of privacy in this heat emitted from his home.

[2] Even if Robinson had demonstrated a subjective expectation of privacy in the heat emitted from his home, he also would have to establish the objective component of the *Katz* two-part test. Under the objective prong, the proper inquiry is whether the " 'government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment.' " *Ford, 34 F.3d at 996 (quoting Oliver v. United States, 466 U.S. 170, 182-83, 104 S.Ct. 1735, 1743, 80 L.Ed.2d 214 (1984))*. Therefore, Robinson would have to demonstrate that his privacy expectation in the heat rising from his house would be accepted by society as objectively reasonable.

In validating the visual inspection of

a greenhouse where marijuana was being cultivated within the curtilage of a house, the Supreme Court found that "no intimate details connected with the use of the home or curtilage were observed" during the aerial viewing. *Florida v. Riley, 488 U.S. 445, 452, 109 S.Ct. 693, 697, 102 L.Ed.2d 835 (1989)* (emphasis added). FLIR surveillance cannot measure temperature; it "merely compare[s] the amount of heat radiated from various objects." *Pinson, 24 F.3d at 1057.* "[T]he mere fact that the police have employed relatively sophisticated forms of technological surveillance does not render the surveillance unconstitutional.... The crucial inquiry, as in any search and seizure analysis, is whether the technology reveals 'intimate details.' " (FN5) *Ishmael, 48 F.3d at 855-56* (footnote omitted) (citation omitted) (quoting *Dow Chemical Co. v. United States, 476 U.S. 227, 238, 106 S.Ct. 1819, 1827, 90 L.Ed.2d 226 (1986)); accord Ford, 34 F.3d at 996; Pinson, 24 F.3d at 1059.*

In this case, the FLIR surveillance revealed only that Robinson's house emitted ***1330** significantly more heat than others in the neighborhood of similar size. No revelation of intimate, even definitive, detail within the house was detectable; there was merely a gross, nondiscrete bright image indicating the heat emitted from the residence. (FN6) Such heat detection with thermal imagery is not the "functional equivalent of an X-ray machine in that it allows officers to 'see' within a structure

what it otherwise cannot see with the naked eye." *Ishmael, 48 F.3d at 856.*

[3] Moreover, there was no intrusion whatsoever into Robinson's home because the emitted heat rose from his house and then was measured by the FLIR surveillance. (FN7) See *id.* (holding that the "manner" of detecting heat is "significant in assessing the reasonableness of the intrusion"). Using infrared surveillance to ascertain heat intensity is analogous to the warrantless use of drug-detecting dogs to locate contraband. See *United States v. Place, 462 U.S. 696, 707, 103 S.Ct. 2637, 2644-45, 77 L.Ed.2d 110 (1983)* (holding that using police-trained dogs to detect drugs in luggage does not violate the Fourth Amendment). Validating FLIR surveillance of a home, the Eight Circuit found that "[j]ust as odor escapes a compartment or building and is detected by the sense-enhancing instrument of a canine sniff, so also does heat escape a home and is detected by the sense-enhancing infrared camera." *Pinson, 24 F.3d at 1058.* Because considerable electric lighting resulting in uncommon heat output is associated with indoor marijuana cultivation, (FN8) unusual heat registered by FLIR surveillance serves as a method of identification.

[4] Thus, we conclude that "[n]one of the interests which form the basis for the need for protection of a residence, namely the intimacy, personal autonomy and privacy associated with a home, are threatened by

[FLIR] thermal imagery." *Id. at 1059;* see *Myers, 46 F.3d at 670* (determining that the thermal surveillance of a home was constitutional, the Seventh Circuit concluded that "[a] thermal imaging scan does not intrude in any way into the privacy and sanctity of a home"). Robinson has failed to establish an objective or reasonable expectation of privacy in the heat emitted from his house resulting from the unlawful marijuana cultivation inside, even if he had met the subjective component of the *Katz* test. Significantly, we are unconvinced that society ever would accept use of the Fourth Amendment to shield unlawful activity within one's home when there are noninvasive methods of detecting such criminal activity through legitimate byproducts, such as the heat at issue in this case. We hold that the FLIR surveillance of Robinson's home was not an unreasonable search violative of the Fourth Amendment.

[5][6][7] Robinson's second issue on appeal is his contention that there was insufficient evidence to constitute probable cause for issuing a search warrant. Accordingly, he argues that execution of the allegedly invalid search warrant violated his Fourth Amendment rights, and that the marijuana seized ***1331** should have been suppressed. Whether a search warrant affidavit provides sufficient facts to establish probable cause of a federal crime is a legal question "subject to complete and independent review by this court." *United*

States v. Miller, 24 F.3d 1357, 1360 (11th Cir.1994). We accord great deference to judicial determination of probable cause to issue a search warrant. *United States v. Gonzalez, 940 F.2d 1413, 1419 (11th Cir.1991)*, cert. denied, *502 U.S. 1047, 112 S.Ct. 910, 116 L.Ed.2d 810*, and cert. denied, *502 U.S. 1103, 112 S.Ct. 1194, 117 L.Ed.2d 435 (1992)*. In issuing a valid search warrant under the Fourth Amendment, a judge " 'is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit ..., there is a fair probability that contraband or evidence of a crime will be found in a particular place.' " *Miller, 24 F.3d at 1361* (quoting *Illinois v. Gates, 462 U.S. 213, 238, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527* (1983)).

[8][9][10] In this case, Agent West of the Narcotics Division of the Alabama Department of Public Safety, who had investigated narcotics offenses for twenty-two years and who specifically had been involved with search warrants concerning indoor marijuana cultivation, presented an affidavit containing the following facts supporting probable cause for a search warrant for Robinson's home: (1) Robinson ordered thirty high-pressure sodium lights from a California company specializing in indoor growing equipment and paid for them with a cashier's check in excess of $7,000.00, (2) Robinson had purchased growing equipment from this company in the past, (3) based on his experience and training, (FN9) Agent West

knew that high-pressure sodium lights are used for indoor marijuana cultivation and that they consume a large amount of electricity and radiate much heat, (4) subpoenaed electric records for Robinson's residence showed higher electrical consumption (FN10) than for houses of comparable size, (FN11) (5) aerial surveillance with FLIR equipment revealed considerably more heat emanating from Robinson's home than from neighborhood houses of comparable size, and (6) visual inspection of the property revealed an attractive house with a swimming pool in an affluent neighborhood, yet no record of Robinson's having paid state income taxes could be located. To the extent that Robinson claims that the FLIR aerial surveillance constituted an unlawful, warrantless search unavailable to support probable cause for issuance of the search warrant, we have negated that argument in our foregoing analysis.

Notwithstanding the additional evidence obtained from the aerial FLIR surveillance, we note that the weight of the other evidence would have provided sufficient probable cause for issuance of the search warrant in question. Cf. *United States v. Olson, 21 F.3d 847, 849* (8th Cir.) ("We find that there was sufficient evidence, independent of the information obtained through the use of the FLIR device, to support a finding of probable cause."), cert. denied, – *U.S.* —, *115 S.Ct. 230, 130 L.Ed.2d 155 (1994); United States v. Deaner, 1 F.3d 192, 197* (3d Cir.1993)

(holding that, even without the FLIR surveillance evidence, the rest of the factual information in the affidavit would have supported probable cause for issuance of the search warrant to determine if marijuana was being cultivated in a private residence); *United States v. Kerr, 876 F.2d 1440, 1443* (9th Cir.1989) (holding that, even eliminating the infrared inspection, the other factual evidence supported probable cause to issue the search warrant for a shed on residential property to determine if marijuana was being ***1332.** cultivated inside); see also *United States v. Barnett, 989 F.2d 546, 557* (1st Cir.) (holding that, although infrared heat-detecting device used in aerial surveillance was operated by state police trooper with little experience in the equipment such that the heat readings for the residential property were questionable, the other factual data presented in the affidavit supported probable cause for a search warrant to investigate the manufacture of methamphetamine), cert. denied, *— U.S. —, 114 S.Ct. 148, 126 L.Ed.2d 110,* and cert. denied, *— U.S. —, 114 S.Ct. 149, 126 L.Ed.2d 110* (1993). The thermal imagery evidence in addition to the cumulative impact of the other evidence amply demonstrated a fair probability that marijuana cultivation was occurring in Robinson's house. Therefore, Robinson's challenge to the sufficiency of the evidence to support probable cause for issuance of a search warrant for his house is meritless.

III. CONCLUSION

Robinson challenges the FLIR surveillance used to detect heat emitted from his house and also the sufficiency of the evidence to support probable cause for issuance of the search warrant that culminated in seizing marijuana that he was cultivating inside his home. As we explained herein, the aerial FLIR surveillance did not violate the Fourth Amendment, and the search warrant was valid because it was based upon sufficient evidence to provide probable cause. We AFFIRM.

EDMONDSON, Circuit Judge, concurring:

I concur in the result and in the opinion, except for the discussion (at 3314-3315) of whether Robinson had a subjective expectation of privacy in the heat generated by his indoor marijuana cultivation. On that question, I admit to considerable doubt.

I do not say that today's court is wrong in its conclusion on the point. But, I do say that the answer is less than clear to me, considering especially that the court stresses the inaction of a homeowner as the decisive element. Because I believe the subjective intent issue could be decided either way without affecting the outcome of this case, I decline to decide the unnecessary and, for me, delicate question of subjective intent.

FN1. At the time of his involvement with Robinson's case, Agent West had twenty-two years of experience in enforcing state and federal drug laws.

FN2. FLIR thermal imaging is a process whereby differences in heat emissions are measured and reflected on a videotape. Heat concentration is indicated on a videotape on a spectrum of light to dark, with bright white showing intense heat. Increasingly, law enforcement personnel are using FLIR thermal imaging to detect indoor marijuana growing operations.

FN3. At the suppression hearing, Agent West testified that the first floor of Robinson's home contained "a cloning room" with "a large number of [marijuana] plants," and that three upstairs bedrooms were "full of [marijuana] plants with lights." R3-9. A consensual search of the prefabricated metal building revealed no evidence of marijuana cultivation there.

FN4. By isolating the heat emitted from Robinson's indoor marijuana cultivation, we recognize that we differ from the Fifth Circuit's analysis of the subjective expectation of privacy in *Ishmael*. Although *Ishmael* involved deliberate venting of the heat resulting from marijuana cultivation in a large steel building in an open field through a continuously operating exhaust fan, the Fifth Circuit rejected a "heat waste analogy," *Ishmael, 48 F.3d at 854*, and

endorsed a "balance of the evidence" rationale, *id. at 855*, to find that the overall attempts to conceal the marijuana cultivation satisfied the Katz subjective expectation of privacy. We disagree because the issue with thermal imagery is the subjective expectation of privacy in the emitted heat, the only measurement of the FLIR, allegedly unconstitutional search at issue in this case.

We also decline to follow the Fifth Circuit's use of *California v. Ciraolo, 476 U.S. 207, 106 S.Ct. 1809, 90 L.Ed.2d 210* (1986), to support its reasoning regarding the subjective expectation of privacy as to thermal imagery. *Ishmael, 48 F.3d at 854.* We distinguish *Ciraolo* factually and analytically because it focuses on the object of the criminal conduct, the marijuana cultivation. While the Court found that enclosing a backyard with a six-foot outer fence and a ten-foot inner fence to obscure marijuana growing manifested subjective intent to maintain privacy concerning unlawful marijuana cultivation, albeit unreasonable under the objective test, *Ciraolo* did not involve surveillance that detected only heat resulting from indoor marijuana cultivation. Consequently, the Court did not address the object of the search at issue in this case, the heat.

Moreover, outdoor and indoor marijuana cultivation are not analogous. Cases relating to outdoor marijuana cultivation necessarily involve actual viewing of the criminal

activity. Indoor marijuana cultivation creates byproducts of the criminal activity, such as heat, which may be isolated to determine the subjective expectation of privacy in a particular byproduct. See *Ford, 34 F.3d at 995* (finding that affirmative venting of excess heat generated from indoor marijuana cultivation did not exhibit an expectation of privacy in the heat emitted from the mobile home). By ignoring this factual and analytical distinction, the Fifth Circuit has interpreted *Ciraolo* too broadly by overextending the scope of the first prong of the *Katz* test.

It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision.

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 399, 5 L.Ed. 257 (1821).

***1332.** FN5. While we disagree with the Fifth Circuit's analysis of the subjective expectation of privacy, we endorse its reasoning under the objective component of the Katz test, under which it concluded that the expectation of privacy in heat detected by thermal imagery was not reasonable. *Ishmael, 48 F.3d at 855-57.*

FN6. In denying Robinson's suppression motion, the district court found that [t]he FLIR detects only the presence of heat emanations. The FLIR does not detect the source of the heat nor provide any information regarding activity within an enclosed space such as defendant's house. Based on the information before it, the Court does not consider the use of the FLIR to be so intrusive as to constitute an unlawful search.

R1-59-2.

FN7. Heat detection through infrared surveillance is conducted through " 'a passive, nonintrusive instrument,' " which " 'does not send any beams or rays into the area on which it is fixed or in any way penetrate structures within that area.' " *Ishmael, 48 F.3d at 856* (quoting *United States v. Penny-Feeney, 773 F.Supp. 220, 223* (D.Haw.1991), aff'd sub nom. on other grounds, *United States v. Feeney, 984 F.2d 1053* (9th Cir.1993)); see *Myers, 46 F.3d at 669* (finding that thermal scanning or surveillance "does not penetrate the viewed object, nor does it emit rays or beams of any type"). At the suppression hearing, Agent West testified that "infrared picks up heat from the house, it does not intrude in any way into the residence or whatever, it's what is released from the residence." R3-19.

FN8. See *United States v. Robertson, 39 F.3d 891, 894 & n. 4* (8th Cir.1994) (acknowledging and listing "[n]umerous cases" that have

"noted that high intensity lights are used to grow marijuana indoors and generate excess heat"), cert. denied, – *U.S.* —, *115 S.Ct. 1812, 131 L.Ed.2d 736* (1995).

FN9. " '[O]pinions and conclusions of an experienced agent regarding a set of facts are properly a factor in the probable cause equation' " for issuing a search warrant. *United States v. Motz, 936 F.2d 1021, 1024* (9th Cir.1991) (alteration in original) (quoting *United States v. Burnes, 816 F.2d 1354, 1357* (9th Cir.1987)).

FN10. Evidence of an extremely high power bill is one factor justifying issuance of a warrant to search for indoor marijuana cultivation. *Mills v. Graves, 930 F.2d 729, 732-33* (9th Cir.1991).

FN11. Robinson maintains that houses used by Agent West are not comparable in size because they are 2,800 square feet, while his house is approximately 4,200 square feet. This argument is inconsequential to our decision. Our review standard requires us to view the evidence in the light most favorable to the prevailing party, the government. Accordingly, we must take the house size stated by the investigating agent over those alleged by Robinson.

EXHIBIT E

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 92-6951 and 92-6991

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

THEODORE ROBINSON,
Defendnat-Appellant.

On Appeal from the United States
District Court for the
Middle District of Alabama

BEFORE: EDMONDSON and BIRCH, Circuit Judges, HILL, Senior Circuit Judge.

PER CURIAM:

The petition(s) for rehearing filed by Appellant, Theodore Robinson, is DENIED.

ENTERED FOR THE COURT:

/s/ EDMONDSON
UNITED STATES CIRCUIT JUDGE